Office Supreme Court, U.S.
FILED
JUN 20 1962
JOHN F. DAVIS, CLERK

No. 17

In the Supreme Court of the United States

..... TERM, 1962

WYCOFF COMPANY, INCORPORATED,
Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, DONALD HACKING and JESSE R. S. BUDGE, its Commissioners, TRAILWAYS, MOUNT HOOD STAGES, d/b/a PACIFIC TRAILWAYS, AMERICAN BUS LINES, INC., CONTINENTAL BUS SYSTEM, INC., DENVER-SALT LAKE-PACIFIC STAGES, CONTINENTAL AMERICAN BUS LINES, WESTERN GREYHOUND LINES, LAKESHORE MOTOR COACH LINES, LINK TRUCK LINES, UINTAH FREIGHTWAYS, SALT LAKE-KANAB FREIGHT LINE, MILNE TRUCK LINES, INC., CARBON MOTORWAY, INC., CONSOLIDATED WASATCH FAST FRT. DIVISION, FRONTIER FREIGHT LINES, LEWIS BROS. STAGES, BINGHAM STAGE LINE, PARK CITY LINE,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

ZAR E. HAYES
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Counsel for Petitioner

TABLE OF CONTENTS

	Page
OPINION	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF MATTERS INVOLVED	4
MANNER OF RAISING FEDERAL CONSTITUTIONAL QUESTION	7
BRIEF IN SUPPORT OF PETITION	8
ARGUMENT	12
APPENDIX A	21

CASES CITED

Public Utilities Commission of Utah v. Pulos, 75 Utah 527, 286 Pac. 947	6
Thatcher v. Industrial Commission, 207 P. 2d 178	17
Utah State Road Commission v. Industrial Commission, 158 P.2d 319	16
Wycoff Company, Incorporated v. Public Service Commission of Utah, 369 P.2d 283	2, 5, 10

TEXTS

16-A C.J.S. 549 17
16-A C.J.S. 861 15

CONSTITUTIONAL PROVISIONS

U. S. Constitution, Amendment XIV 3
Constitution of Utah, Art. I, Sec. 7 3

STATUTES

United States Code Annotated
Title 28, par. 1257(3) 2

Utah Code Annotated, 1953
54-7-15 10
54-7-16 10
54-7-19 16
54-7-25 ..... 3, 4, 13, 15
54-7-29 ..... 4, 6, 13, 14

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

TO THE HONORABLE THE CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Your petitioner, WYCOFF COMPANY, INCORPORATED, respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the Supreme Court of the State of Utah in its Case No. 9461.

OPINION

The opinion to be reviewed is in Utah Supreme Court Case No. 9461 set forth fully in the Appendix hereto (Page 20) and is reported in .... Utah ....., 369 Pac. (2d) 283.

JURISDICTION

This court has jurisdiction to hear and determine the issues and such jurisdiction is evoked under the provisions of 28 U.S.C.A. Par. 1257 (3), authorizing review by writ of certiorari of a decree rendered by the Utah Supreme Court (its highest State court) where the validity of a State statute and the action of a State commission thereunder is repugnant to the Constitution of the United States. The decision of the Utah Supreme Court (Wycoff Company, Incorporated v. Public Service Commission of Utah, 369 Pac. (2d) 283) was rendered March 1, 1962, and the Petition for Rehearing therein was denied March 30, 1962.

Review of the arbitrary and unconstitutional usurpation of judicial authority by state administrative agencies is a matter of national importance due to the numerous and diverse types of quasijudicial administrative procedures in the several states.

The federal issues here presented were first raised by objections to the proceedings before the Commission, in the Petition for Reconsideration, then in the direct appeal to the Utah Supreme Court, and reasserted in the Petition for Rehearing before that court.

QUESTIONS PRESENTED

(a) Are the constitutional rights of petitioner as a common motor carrier violated when a state administrative body (Public Service Commission of Utah) arbitrarily acts in three mutually inconsistent positions as *investigator, prosecutor* and *judge* in investigating, hearing complaints and fixing penalties against a motor carrier operating in intrastate commerce in Utah for purported violations of restrictions in that motor carrier's certificate of authority issued by the same commission?

(b) Is Section 54-7-25 Utah Code Annotated 1953 violative of the constitutional rights of a certificated common motor carrier as interpreted by the Utah Supreme Court as permitting the administrative body to prosecute purported violations of its orders, hear the same and determine the penalty?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition involves the due process clause of the 14th Amendment to the Constitution of the United States; Article I, Section 7 of the Constitution of Utah; and the validity and constitutionality of the following

Utah statutes found in the Utah Code Annotated 1953: 54-7-25, 54-7-29.

STATEMENT OF MATTERS INVOLVED

The Public Service Commission of Utah, hereinafter referred to as the "Commission," instigated an investigation into the practice of petitioner, Wycoff Company, Incorporated, hereinafter referred to as "Wycoff," as a common carrier of express shipments within Utah. The Commission immediately dispatched its own investigators to gather evidence from the Wycoff books and records, relating to purported transportation of express shipments in excess of prescribed weight limitations. The Commission then set a hearing date, presented the evidence of its own investigators, through its own staff attorney, to itself as judge, and then declared a penalty of $18,500.00 against Wycoff for 19 purported violations of the express shipment weight restrictions.

Though notice of hearing of the "investigation" was given, no notice of any violation or a threatened penalty was issued and the Commission had never before in its entire history attempted to impose a penalty against a motor carrier. Objections were timely raised as to the unconstitutional character of the proceedings as being violative of due process of law. Prior demands for a bill of particulars had been denied by the Commission, so Wycoff was not informed by pleadings or notices as to the nature of its supposed offense or the possible penalty.

The Commission received Petitions for Reconsider-

ation both from the original complaining, competing motor carriers and also from Wycoff, but denied them all. Thereupon an appeal was taken to the Utah Supreme Court, where the issues were argued. That Court's decision, March 1, 1962, 369 Pac. 2d. 283, affirmed the Commission's Order imposing the penalty and said in part:

> "Wycoff takes the position that the penalty provided for is criminal in nature, that it is therefore a judicial function to determine whether the violations chraged has been committed; and if so, to impose the penalty prescribed therefor; that accordingly it was not within the authority of the Commission to perform such judicial function.
>
> "There is no question but that in performing its multifarious duties in franchising and regulating public utilities the Commission is required to and does perform some functions of a judicial or quasi-judicial nature; nor that it is within the competence of the Legislature to confer upon the Commission the power to do so and to enforce the law and its regulations made pursuant thereto by administrative procedures. It is well established that this includes the imposition of a monetary penalty for violation of law or lawful orders or regulations promulgated by the Commission within the scope of its administrative responsibility. The fact that our statute provides the Commission with an auxiliary remedy, by going to court if that becomes necessary, does not mean that the Commission can not impose the penalty prescribed by the Public Utilities Act. In that regard we have the guidance

of decisions from other jurisdictions having statutes similar to ours."

The section referring to the so-called "auxiliary remedy" is Section 54-7-29, UCA 1953, which provides: "Actions to recover penalties under this title shall be brought in the name of the State of Utah. In any such action all penalties incurred up to the time of commencing the same may be sued for and recovered." The general rule of statutory interpretation should apply here, that the specification of one definite remedy and procedure excludes the availability of others by implication.

Our Supreme Court has taken two diametrically opposite positions on this very issue, and the last opinion (presently here under consideration) does not mention or purport to overrule the earlier decision.

In Public Utilities Commission of Utah v. Pulos, 75 Utah 527, 286 Pac. 947, the Commission went to the District Court to enjoin an alleged violation of motor carrier rights. In response to the objection that such matter should have been heard and determined by the Commission, as was done in our present Wycoff case, the Utah Supreme Court declared that the Commission properly went to Court rather than conducting hearings to determine whether violations had occurred. The Court's language (p. 951) is in part as follows:

> " . . . Thus, if the defendant at the time complained of was operating a public utility in this state contrary to law, the commission not only had the authority but it was its duty to bring a proceeding in the district court to enforce a compliance with the law. Nor is there any provision

in the act which requires that any proceeding be had before the commission prior to the commencement of an action or proceeding before the district court. The act provides that an action or proceeding either for a writ of mandamus or writ of injunction shall be commenced in the district court 'whenever the commission shall be of the opinion that any public utility is failing of omitting or about to fail or omit, to do anything required of it by law;' etc. There is no language in the act which will bear the construction for by the defendant that the commission, before an action or proceeding is commenced in the district court, must hold a hearing before itself to determine whether or not the party complained of was engaged in operating a public utility at the time charged in the complaint. Such a hearing would be a useless proceeding, because obviously the determination of such fact by the commission would not be binding on the district court."

MANNER OF RAISING FEDERAL CONSTITUTIONAL QUESTION

The absence of due process of law was raised by Wycoff at the earliest opportunity in the investigation by oral objections in the record. This position was renewed by the written petition for Rehearing before the Commission. Then these same federal constitutional questions were raised in the original petition and brief to the Utah Supreme Court and in the Petition for Rehearing presented to said Court.

At all stages of the proceedings, both the Commission and other parties have been advised that petitioner herein, Wycoff, has objected to the same on the basis

that such violated its constitutional rights to due process of law.

BRIEF IN SUPPORT OF PETITION

Comes now WYCOFF COMPANY, INCORPORATED, and respectfully makes the following representations by way of a statement of facts and brief in conjunction with the above designated appeal and petition for a Writ of Certiorari:

1. Petitioner is a Utah corporation, having its principal place of business in Salt Lake City, Utah, and operating as a common motor carrier of property for hire in pursuance of Certificates of Public Convenience and Necessity duly issued by the Public Service Commission of Utah, as well as transporting commodities in interstate commerce for hire in pursuance of Certificates issued by the Interstate Commerce Commission.

2. The Public Service Commission of Utah is a duly constituted administrative body created by the statutes of Utah to perform numerous duties, among which is the regulation of motor carriers engaged in the transportation of commodities in intrastate commerce within the State of Utah.

3. In January, 1958, in pursuance of an application made by Wycoff, the Public Service Commission of Utah, after a hearing and presentation of evidence, issued a Certificate, No. 1162, Sub. 2, authorizing the transportation of general commodites of 100 pounds or less i weight in express service between all points in

the State of Utah. Subsequently, on December 21, 1959, without any prior notice, the Commission issued its order amending said Certificate "nunc pro tunc as of the 21st day of January, 1958," by striking the word "item" and inserting the word "shipment" in descriptions contained within said Certificate, imposing certain restrictions on the transportation of commodities.

4. Shortly prior to the issuance of said nunc pro tunc order, several motor carrier competitors to the petitioner filed a complaint with the Commission seeking an order revoking the operating authority of Wycoff for violations of the terms and conditions of various certificates. Thereafter other common motor carriers, bus lines and truck lines joined in similar complaints before the Commission, asking for revocation of the operating authority, and in one instance compulsory revision of tariffs published by Wycoff.

5. An answer was duly filed thereto and a demand for a bill of particulars presented, together with a motion to stay the hearing until such bill of particulars was duly presented.

6. On February 11, 1960, the Commission refused to grant the demand for bill of particulars, and instead ordered that on the complaints and "upon its own motion it shall enter upon an investigation as to whether Wycoff has operated, or is operating, contrary to or in excess of its authority as specified in its Certificate of Convenience and Necessity No. 1162, Sub. 2, issued by th eCommission." The order further directed Wycoff to submit for examination by the Commission's representatives "all its accounts, books and records."

7. Subsequent thereto a date for hearing was set upon this investigation, and at said hearing the agent and representative of the Commission who had made the investigation presented evidence as to what was contained in the books and records of shipments. The Commission then, upon hearing the evidence of its own agent, and as judge, considered the said report, and then thereafter entered its order imposing a penalty of $18,500.00 against Wycoff upon the basis of $500.00 each for 39 purported separate days of violation of its operating authority.

8. At the said hearing Wycoff promptly raised objections to the unconstitutional nature of the proceedings, and was able to present only a general denial, by testimony, of the asserted violations, as it had not had the opportunity of being confronted with any bill of particulars or a statement of specification as to the nature of the claims which were to be made against it.

9. A Petition for Rehearing, as required by the Utah Statutes, Section 54-7-15, Utah Code Annotated 1953, was duly presented to the Commission thereon, and thereafter denied, and thereupon an appeal was taken to the Utah Supreme Court in pursuance of the provisions of Section 54-7-16, Utah Code Annotated 1953, wherein the constitutional objections were raised at all stages and duly presented by brief and argument before that Court.

10. On March 1, 1962, the Supreme Court of the State of Utah, in Case No. 9461, issued its decision (369 Pac. 2d 283) wherein it affirmed the imposition of the penalty by the Public Service Commission of Utah.

11. A Petition for Rehearing was duly prepared and presented to the Supreme Court of the State of Utah, where again the constitutional issues were raised and presenetd, but said Petition for Rehearing was denied without an opinion, March 30, 1962.

12. A copy of the decision of the Supreme Court of the State of Utah is attached hereto and by this reference made a part hereof, and it will be observed therefrom that the Court did not pass upon the constitutional issues that were presented by brief and by argument before the court.

13. Wycoff asserts that this court has jurisdiction to hear and determine the matters, and that it should grant certiorari so as to make a full hearing and determination of these matters, due to the widespread and arbitrary operation of the many state administrative agencies, on the following grounds:

(a) The notices of the hearing given by the Commission to Wycoff failed to state that it was contemplated that any fine or penalty would be imposed against it, but merely referred to the "investigation" of its operations, and hence Wycoff has been deprived of due process of law, in violation of the Federal Constitution.

(b) The Commission appeared in the proceeding in triple, inconsistent positions, namely, as the investigator, the prosecutor and the judge, thereby depriving Wycoff of due process of law and of a fair and judicial consideration of the issues.

(c) The statutes under which the Commission operates are unconstitutional, as violative of the provisions of the Federal Constitution and Constitution of the State of Utah.

14. The defendant Commission, though basically a branch of the executive arm of the Government, has assumed and performs judicial functions in a manner inconsistent with the statutory and constitutional rights of those subject to regulation by it, and it has usurped unto itself procedures wholly inconsistent with due process of law and other rights of citizens of and corporations within the State of Utah and the United States of America.

15. This case is of great national importance, due to the fact that there are within all of the 50 states in the United States of America regulatory commissions of various types, sizes and character which operate without regard to constitutional rights, and which, unless guided by a firm decision of this court, will constantly encroach upon and usurp the rights of citizens of the United States, by procedures such as those in this case, which appear to be expedient to it, but which are contrary to the established principles of law and judicial procedure and violative of the constitutional rights under the Federal Constitution of the United States.

ARGUMENT

As a state administrative body is purely a creature of statute and has no inherent judicial powers, those whose very economic existences are dependent upon such Commission are entitled to full constitutional protec-

tions. A motor carrier must seek from the Commission the right to do business and then is subject to reasonable regulations. It should not be subjected also to arbitrary and capricious penalties handed out by such commission without due process of law.

The Utah statute at issue in Section 54-7-25 (1) Utah Code Annotated 1953, "Violations by utilities—Penalty.—(1)

> "Any public utility which violates or fails to comply with any provision of the Constitution of this state or of this title, or which fails, omits or neglects to obey, observe or comply with any order, decision, decree, rule, direction, demand or requirement, or any part or provision thereof, of the commission, in a case in which a penalty has not hereinbefore been provided for such public utility, is subject to a penalty of not less than $500.00 nor more than $2,000.00 for each and every offense.)

This section is then followed by Section 54-7-29, Utah Code Annotated 1953:

> "Actions to recover fines and penalties.—Actions to recover penalties under this title shall be brought in the name of the state of Utah. In any such action all penalties incurred up to the time of commencing the same may be sued for and recovered. All fines and penalties recovered by the state in any such action, together with cost thereof, shall be paid into the state treasury to the credit of the general fund. Any such action may be compromised or discontinued on application of the commission upon such terms as the court shall approve and order."

It is our position that the first section, 54-7-25 U.C.A. 1953, did not vest in the Commission the power

to initiate, investigate, prosecute, hear and judge before itself alleged infractions of orders of the Commission. The usurpation of such judicial function by the Commission is violative of due process and hence the statute as so construed by the Commission is unconstitutional.

The section of the statutes preceding this one accords injunctive rights to stop violations or threatened violations by a utility and reads:

> "Section 54-7-24. "Injunction to stop violations or threatened violations.—Whenever the commission shall be of the opinion that any public utility is failing or omitting, or is about to fail or omit, to do anything required of it by law, or by any order, decision, rule, direction or requirement of the commission, or is doing anything, or is about to do anything, or is permitting anything, or is about to permit anything, to be done, contrary to or in violation of law or of any order, decision, rule, direction or requirement of the commission, it shall direct the commencement of an action or proceeding in the name of the state, for the purpose of having such violations or threatened violations stopped or prevented."

It is to be noted that an action thereon "in the name of the state" may be instituted. Identical language is found in Section 54-7-29, (which is the activating section for penalties) as it says, "Actions to recover penalties under this title shall be brought in the name of the State of Utah."

We have referred to the earlier Utah Supreme Court decision, Public Utilities Commission v. Pulos (supra) wherein the Utah Court held that the procedure

before the Commission was improper and unnecessary and that the Commission should apply to the District Court for an injunction if it felt such to be needed. A distinct parallel exists in this Wycoff case. The Commission should have applied directly to the Court to hear and determine the purported violations and assess a penalty, if any.

To construe the statute 54-7-25 U.C.A. 1953 to open the door for the Commission to act as investigator, prosecutor and judge is unconstitutional. The multiple, inconsistent position of the Commission denies it of the status of a fair and impartial judicial or quasi-judicial body.

16A. C.J.S. 861 (Constitutional Law) reads:

"(2) *Requisites and Sufficiency of Hearing.*

"Due process of law, with respect to administrative proceedings, requires but one adequate hearing in which the procedure is consistent with the essentials of a fair trial, and the hearing must be a full and fair one, with an opportunity to offer evidence, befores an impartial officer, board, or body free of bias, hostility and pre-judgment.

862. "In order to comply with the requirements of due process, the hearing granted by an administrative body must be a full and fair one, before an impartial officer, board, or body free of bias, hostility, and prejudgment; but mere irregularity or error with respect to a hearing cannot be made the basis of a claim of denial of due process, and a person cannot complain of a defect in an administrative hearing as a denial of constitutional rights as long as he obtains a full hearing before a court on the question in issue. The fact that the administrative agency

is both the accuser and judge does not deprive accused of due process of law, especially where an appeal from the determination of the agency may be had to the courts."

This last noted proviso as to an appeal to the Courts is nugatory in this case as interpreted by the Utah Commission, because such is not an appeal on the facts (as the Utah Supreme Court is bound by the determination of the Commission thereon — Section 54-7-19 U.C.A. 1953)—and there can be no true review in consonance with due process. There was no means provided or permitted for a "full hearing before a court on the question in issue."

The following cases relate to prior action of the Utah Supreme Court on the fundamentals of due process as pertaining to administrative commissions within the State of Utah.

Utah State Road Commission v. Industrial Commission, 158 P. 2d 319 (April 1946). In this proceeding the Industrial Commission proceeded to make a determination under the Act and established an award without any prior notice to nor appearance by the employer, the Utah State Road Commission. It was urged that due process was satisfied by the fact that the employer had the right to apply for a rehearing if the award is not acceptable, and hence the Industrial Commission would have an opportunity to correct itself.

This was held not to be due process, and after reciting the fact that the Industrial Commission had continuing jurisdiction of the subject matter and of the parties, the Court then said that the mere availability of this right to rehearing after a determination

by the Commission under this continuing jurisdiction was not sufficient to correct the error of no notice of the original hearing. "Such is not the law. The rights of a party entitled to notice of hearing before a decision are not fully protected by notice after decision and an opportunity to request a rehearing."

In the case of Thatcher v. Industrial Commission, 207 P. 2d 178 (June 1949), somewhat similar issues were involved. Therein the Industrial Commission awarded nominal attorney's fees, notwithstanding the existence of an agreement between the injured and the attorneys for a fixed amount, and notwithstanding the fact that the case involved an appeal to the Supreme Court of the State of Utah and numerous appearances.

No hearing was given to the attorneys as to the determination of the fees, notwithstanding a request on their part that such a hearing be had. The decision of the Supreme Court reversed the Industrial Commission, and at page 183 we find, "The plaintiffs contend secondly that they were denied due process of law in that the Industrial Commission ignored their request for a hearing as to what would be a reasonable fee for the services performed. In this regard the plaintiffs must prevail."

An extensive summary of the law relating to the constitutionality of administrative proceedings is found in 16-A C.J.S. 549, et seq. Paragraph 628 of the Constitutional Law division deals specifically with this problem, and Subsection (b), starting at page 856, relates to the factor of notice and hearing. The headnote

is "The right to notice of hearing is an administrative proceeding depends on the character of the proceedings and the circumstances involved, but notice and hearing are ordinarily essential to due process in a proceeding affecting a person's liberty or property rights."

It is true that the notice of the time of the hearing was given in this present Wycoff proceeding, but those notices failed to apprise the carrier of the potential fine or penalty which might be imposed or that such relief would be considered. Further, the notice did not delineate the nature of the offense beyond the mere statement that the Commission was about to engage in an "investigation" of the practices of this carrier. It is to be noted further that upon a request for a bill of particulars as to the nature of the purported offense upon which the proceedings were based, such request was denied and the Commission then launched into its investigation as the investigator, the prosecutor and the judge thereon.

WHEREFORE, Petitioner, Wycoff, respectfully submits that this is a matter of national importance affecting administrative procedures in Utah and throughout the nation. You are respectfully requested to accept the enclosed petition for a writ of certiorari, consider the same and grant such a writ of certiorari so that a full and complete review of the issues, conduct and statutes referred to above may be considered from a constitutional viewpoint.

Dated this 23rd day of May, 1962.

19

WYCOFF COMPANY, INCORPORATED

By.....

Zar E. Hayes

.....

Calvin L. Rampton

721 Continental Bank Building

Salt Lake City, Utah

Attorneys for Petitioner

APPENDIX A.

IN THE SUPREME COURT OF THE STATE OF UTAH

Wycoff Company, Inc.,
Plaintiff,
vs.
Public Service Commission of Utah; Trailways, Mount Hood Stages, et al.,
Defendants.

No. 9461
March 1, 1962
(369 Pac. (2d) 283)

CROCKETT, Justice:

This proceeding challenges an order of the Public Service Commission imposing a penalty of $18,500.00 upon Wycoff Company, Inc., for repeated violations of its common motor carrier operating authority.

Wycoff has for many years held rights as a motor carrier to haul certain items requiring express service. The particular phase of its authority with which we are here concerned (Certificate of Convenience and Necessity No. 1162, Sub. 2 issued January 27, 1958) permits it:

> "... to operate as a common motor carrier by motor vehicle of general commodities of 100 pounds or less in weight, in express service, between all

points and places in the state of Utah, according to schedules filed herein except [certain exceptions noted]; said authority to be subject to the following restrictions:

(a) Applicant *shall be limited to* the transportations of *shipments of not to exceed* 100 *pounds* upon a weight basis. *Shipments will not be separated for the purpose of avoiding this restriction.*

(b) Applicant *shall not transport in excess of* 500 *pounds* on a weight basis *of such express items on any one schedule* each way operating over the routes and departing at the times set forth in exhibit 2 in this proceeding.

(c) .....(d) .....(e) .....

(f) *'Shipment'* as used herein *shall refer to commodities moving on a single bill of lading from one consignor to one consignee."* (Emphasis added).

The origin of this authority to handle small shipments is of some significance in treating the issues here involved. It originated as a special fast express service hauling newspapers and movie film over routes served by other regular common carriers of freight. It has been permitted to take other items such as cut flowers, drugs, blood plasma, and some others, which because of their perishable nature require fast service. Wycoff made an application representing to the Commission that due to its type of service it had many requests to haul small shipments of various items, and requested authority to transport them. After competing carriers filed protests an agreement was worked out that whatever shipments Wycoff accepted would be limited to 100 pounds shipment by any one shipper and to 500 pounds on any one shipping schedule (that is, on any truck or trucks leaving at one time). Upon that basis the protests were withdrawn and the authority here in question was issued.

We spare the detail of subsequent happenings in regard to this particular authority except these essential facts: Wycoff attempted to have the limitations removed or increased; competing carriers made complaints that Wycoff was continually violating the limitations. In January, 1960, the Commission gave notice to Wycoff and the complaining carriers of a hearing on such complaints. Wycoff filed a demand for a bill of particulars and a motion to stay proceedings. Upon its own motion, pursuant to Sec. 54-4-2, U.C.A. 1953, the Commission initiated an investigaton of the matter and all interested parties agreed that the hearing should be continued without date.

Meanwhile, the Commission had caused its investigation to be made of Wycoff's operation and, pursuant to notice, on August 4, 1960, a hearing was held. The evidence showed that Wycoff had persistently violated both the restriction prohibiting the shipment of more than 500 pounds of such freight on any one schedule; and also that forbidding the splitting of shipments to avoid the limitation of 100 pounds for any one shipper, the most extensive violations being as to the latter restriction. The Commission found that violations had occurred on 37 separate days. It indicated that they would warrant the cancellation of Wycoff's authority, as requested by the complainants, but also indicated that considerations of public interest made it seem unwise to take this extreme measure and that public convenience and necessity would best be served by imposing a penalty as authorized by Sec. 54-7-25(1) U.C.A. 1953:

> "Violations by utilities — Penalty — (1) Any public utility which violates or fails to comply with . . . any order . . . of the Commission, in a case in which a penalty has not hereinbefore been provided for such public utilities, is subject to a penalty of not less than $500 nor more than $2,000 for each and every offense."

The Commission assessed a penalty of $500 per day for the 37 days, totaling $18,500.00.

Wycoff takes the position that the penalty provided for is criminal in nature, that it is therefore a judicial function to determine whether the violations charged had been committed; and if so, to impose the penalty prescribed therefor; that accordingly it was not within the authority of the Commission to perform such judicial function.

There is no question but that in performing its multifarious duties in franchising and regulating public utilities the Commission is required to and does perform some functions of a judicial or quasi-judicial nature; nor that it is within the competence of the legislature to confer upon the Commission the power to do so and to enforce the law and its regulations made pursuant thereto by administrative procedures. It is well established that this includes the imposition of a monetary penalty for violation of law or lawful orders or regulations promulgated by the Commission within the scope of its administrative responsibility.[1] The fact that our statute provides the Commission with an auxiliary remedy, by going to court if that becomes necessary,[2] does not mean that the Commission cannot impose the penalty prescribed by the Public Utilities Act. In that regard we have the guidance of decisions from other jurisdictions having statutes similar to ours.[3]

We are quite in accord with these averments made about the penalty here under consideration: that it can be very burdensome; that it is similar in nature and somewhat akin to a penalty imposed for violations of law which may be classified as crimes; and that for this reason a high degree of caution should be observed in determining whether there has been a violation by requiring a greater quantum of proof than in ordinary proceedings before the Commission. While there is no

1. See Helvering v. Mitchell, 303 U.S. 391.
2. Sec. 54-7-29.
3. York Tel. & Tel. Co. v. Pa. Public Utilities Comm. ... Pa. ..., 121 A. 2d 605 (1956); State v. Cater's Motor Freight Sys., Wash. ..., 179 P.2d 496 (1947); See Davis Adm. Law, Sec. 2.13.

basis in law to justify a requirement that the failure to comply with regulations must be proved beyond a reasonable doubt, as urged by the plaintiff, we think that due to the nature and purpose of this statute, it is reasonable and practical to require that the evidence of violation be clear and convincing before the imposition of such a penalty would be justified.[4] However, it cannot be questioned that the evidence here meets that requirement. Wycoff's records themselves reflect the numerous violations. Furthermore, Mr. Wycoff's own testimony went more to explanations of reasons why he could not comply with the limitations on authority and thus to justify violations than to deny that they occurred.

Affirmed. Costs to defendants.

WE CONCUR:

Lester A. Wade, Chief Justice

F. Henri Henriod, Justice

Roger I. McDonough, Justice

E. R. Callister, Jr., Justice

4. Cf. statement in Calif. Milk Transport v. Panopulos. 43 Cal. R.C.R. 637.

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 197

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In the Supreme Court of the United States

OCTOBER TERM, 1962

WYCOFF COMPANY, INCORPORATED
Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, DONALD HACKING and JESSE R. S. BUDGE, its Commissioners, TRAILWAYS; MOUNT HOOD STAGES, d/b/a PACIFIC TRAILWAYS, AMERICAN BUS LINES, INC., CONTINENTAL BUS SYSTEM, INC., DENVER-SALT LAKE-PACIFIC STAGES, CONTINENTAL AMERICAN BUS LINES, WESTERN GREYHOUND LINES, LAKE SHORE MOTOR COACH LINES, LINK TRUCK LINES, UINTAH FREIGHTWAYS, SALT LAKE-KANAB FREIGHTLINES, MILNE TRUCK LINES, INC., CARBON MOTORWAY, INC., CONSOLIDATED-WASATCH FAST FREIGHT DIVISION, FRONTIER FREIGHT LINES, LEWIS BROS. STAGES, BINGHAM STAGE LINE, PARK CITY LINE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OF RESPONDENTS IN OPPOSITION

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August 13, 1962

INDEX

	Page
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF MATTERS INVOLVED	3
ARGUMENT IN OPPOSITION TO PETITION	7
CONCLUSION	24

CITATIONS

Cases

Allen v. Grand Central Aircraft Co., 347 U.S. 535, 98 L. Ed. 933, 74 S. Ct. 745 (1954) 14

Ashworth Transfer Co. v. Public Service Commission, 268 P.2d 990, 994 (Utah, 1954) 16, 17

Brinkley v. Hassig, 83 F.2d 351, 356 (C.C.A. 10th, 1936) 11

Federal Trade Commission v. Nat'l. Lead Co., 352 U.S. 419, 1 L.Ed. 2d 438, 77 S. Ct. 502 (1957) 20

General Talking Pictures Corp. v. Western Electric, 304 U.S. 175, 177-178, 82 L. Ed. 1273, 1275, 58 S. Ct. 849 (1938) 8, 9

Helvering v. Mitchell, 303 U.S. 391, 400, 82 L.Ed. 917, 922, 59 S. Ct. 630 (1938) 23

Lake Shore Motor Coach Lines, Inc. v. Welling, 33 9 P.2d 1011, (Utah, 1959) 16, 17

Lawn v. U.S., 335 U.S. 339, 354, 2 L. Ed. 2d 321, 333, 78 S. Ct. 311 (1958) 8, 9

Lloyd Sabaudo Societa Anonima v. Elting, 287 U.S. 329, 335, 77 L. Ed. 341, 346, 53 S. Ct. 167 (1932) 15

Los Angeles & S. L. R. Co. v. Public Service Commission, 240 P.2d 493 (Utah, 1952) 16, 17

North Laramie Land Co. v. Hoffman, 268 U.S. 276, 69 L. Ed. 953, 45 S. Ct. 491 (1925) 18, 19

Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339, 53 L. Ed. 1013, 1022, 29 S. Ct. 671 (1909) 14

People v. Western Airlines, 268 P.2d 723, 729 (Cal., 1954), appeal dismissed 348 U.S. 859, 99 L. Ed. 677, 75 S. Ct. 87 10

Public Service Commission v. Pulos, 286 P. 949 (Utah, 1930) 18

Wong Yang Sung v. McGrath, 339 U.S. 33, 46, 94 L. Ed. 616, 626, 70 S. Ct. 445 (1950) 10

Wycoff Company, Inc. v. Public Service Commission, et al., 369 P.2d 283 (Utah, 1962), (case below) 2, 6, 7 13, 16, 18, 20, 21

York Telephone & Telegraph Co. v. Public Utilities Commission, 121 A.2d 605 (Pa., 1956) 13

CONSTITUTIONS AND STATUTES

Utah Constitution, Article XII, Section 15 12

5 U.S.C. 1001 et seq 10

Utah Code Annotated, 1953

54-6-4 12
54-6-20 19
54-7-1 23
54-7-16 17
54-7-20 14
54-7-25 (1) 3, 12, 19
54-7-29 .... 3, 12, 13

MISCELLANEOUS

Rules of U.S. Supreme Court

Rule 21 (2) 7
Rule 40 (2) 7

Rules of Public Service Commission of Utah, Rule 21.6 23

1 Am. Jur. 2d 78, p. 873 11

16A C.J.S. 862 16

36 C.J.S. p. 390-402 18

NO. 197

In the Supreme Court of the United States

OCTOBER TERM 1962

WYCOFF COMPANY, INCORPORATED,
Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF UTAH, HAL S. BENNETT, DONALD HACKING and JESSE R. S. BUDGE, its Commissioners; TRAILWAYS; MOUNT HOOD STAGES, d/b/a PACIFIC TRAILWAYS, AMERICAN BUS LINES, INC., CONTINENTAL BUS SYSTEM, INC., DENVER-SALT LAKE-PACIFIC STAGES, CONTINENTAL AMERICAN BUS LINES, WESTERN GREYHOUND LINES, LAKE SHORE MOTOR COACH LINES, LINK TRUCK LINES, UINTAH FREIGHTWAYS, SALT LAKE-KANAB FREIGHTLINES, MILNE TRUCK LINES, INC., CARBON MOTORWAY, INC., CONSOLIDATED-WASATCH FAST FREIGHT DIVISION, FRONTIER FREIGHT LINES, LEWIS BROS. STAGES, BINGHAM STAGE LINE, PARK CITY LINE,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF UTAH

BRIEF OF RESPONDENTS IN OPPOSITION

TO THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES, OF THE SUPREME COURT OF THE UNITED STATES:

Respondents respectfully pray that a Writ of Certiorari not issue to review the judgment of the Supreme Court of the State of Utah in its Case No. 9461 entitled *Wycoff Company, Incorporated v. Public Service Commission, et al.*, reported in 13 Utah 2d 123, 369 P.2d 283 (March 1, 1962).

QUESTIONS PRESENTED

I. Whether the Petition so violates the Rules of the Court that the Court should disregard and strike it.

II. Was petitioner denied Federal due process of law when the Utah Public Service Commission investigated petitioner's activities as a motor carrier operating in intrastate commerce in Utah, and three Commissioners, who did not participate in such investigation, determined that petitioner had violated the Commission orders and imposed the minimum statutory monetary penalty on petitioner for each violation.

III. Was petitioner denied Federal due process of law when the Commission, rather than a state trial court determined the violations and assessed the penalty.

IV. Was Petitioner denied Federal due process of law when the notices of hearing issued by the Commission in such proceedings failed to advise petitioner that the statutory monetary penalty might be assessed.

V. Was Petitioner denied Federal due process of law when the Commission denied petitioner's Demand for Bill of Particulars and instead ordered an investigation into petitioner's activities concerning certain specified violations.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition involves the due process clause of the Fourteenth Amendment of the United States Constitution and the constitutionality of Sections 54-7-25 (1) and 54-7-29, Utah Code Annotated, 1953, the statutes being quoted at page 13 of the Petition.

STATEMENT OF MATTERS INVOLVED

Since the Petition fails to set out references to the record, as required by United States Supreme Court Rule 40 (2), respondents are obliged to restate petitioner's Statement of the Case, called "Brief" therein, so the Court will have those references before it.

Petitioner, at the time of these proceedings, was a Utah intrastate motor common carrier holding a Certificate of Convenience and Necessity issued by the Public Service Commission of Utah which permitted it in general to transport general commodities in express service in Utah, according to schedules filed, but subject to the following restrictions among others:

> "(a) Applicant (Petitioner) shall be limited to the transportation of shipments not to exceed 100 pounds upon a weight basis. Shipments will not be separated for the purpose of avoiding this restriction.
>
> (b) Applicant shall not transport in excess of 500 pounds on weight basis of such express items on any one schedule . . ." (R-336, 338)

In December, 1959, certain respondents, all common motor carriers operating within Utah, filed complaints with the Public Service Commission of Utah, alleging Petitioner's persistent willful and knowing violations of the restrictions in its Certificate. Those complaints specifically alleged that, as shown by certain bills of lading previously filed with the Commission and as shown by testimony of petitioner's employee in another proceeding before the Commission, petitioner had been carrying shipments exceeding 100 pounds and transporting more than 500 pounds on any one schedule, contrary to the restrictions of its certificate, and prayed that the Commission revoke petitioner's operating authority (R-294, 302). Other complaints also prayed that the Commission take such other and further actions as might be indicated in the premises. Petitioner filed a formal answer to the complaints through its counsel (R-303, 306).

On January 27, 1960, petitioner filed a Demand for Bill of Particulars (R-311) and on February 1, 1960, respondents filed their Reply thereto (R-312, 316); hearing upon the Demand was held February 8, 1960 and the Commission denied it and, based upon the complaints on file and its own motion and pursuant to its statutory investigative authority ordered that petitioner submit its accounts, books and records for examination by the Commission's representatives, and ordered that such representatives report to the Commission specifying:

> "(1) what, if any, separate articles in excess of 100 pounds in weight had been transported by said Wycoff Company, Incorporated, intrastate in Utah since January 21, 1958,
>
> (2) what shipments in excess of the total weight

> of 500 pounds of express items, of 100 pounds or less each, have been transported intrastate by said company since said date on any one of the schedules.
>
> * * *Upon coming in of said report, the Commission will issue such order as may be proper in the premises." (R-319, 320)

On May 13, 1960, petitioner filed a Petition in the same action before the Commission requesting that Commission amend its certificate to delete the 500 pound per schedule limitation saying:

> "2. As a result of the said investigation and a review of the volume of express shipments being handled under the authority issued in Certificates of Convenience and Necessity No. 1162 - Sub 2, Petitioner has determined that the needs and requirements of the shippers make it difficult, if not impossible, to comply with the stated restrictions as to total weight of 500 pounds of express items per schedule in intrastate commerce. *In consequence, on numerous occasions, it has transported in excess of 500 pounds of express items on a schedule.*" (Emphasis added) (R-324)

The Commission employed independent certified public accountants to examine the accounts, books and records of petitioner (R-17) and an inspector of the Commission spot-checked petitioner's trucks on the highways (R-62, 64).

On June 7 and June 17, 1960, the Commission ordered postponement of the hearing and each Order contained the following:

> "It is further ordered that Respondent (petitioner) shall * * * not haul total shipments of express in excess of 500 pounds in each truck or haul any

specific shipment in excess of 100 pounds * * *" R-330, 332)

On August 4, 1960, the Commission, having completed its investigation and having received the report from its certified public accountants, held the hearing on the complaints and investigation (R-334). Petitioner was represented by counsel throughout. The matter was determined by three Commissioners (R-340) whom petitioner does not allege were involved in the investigation and prosecution of the matter; instead two attorneys for the Public Service Commission presented evidence as did counsel for respondents (R-4, 5). Petitioner confronted the witnesses, heard their testimony under oath, thoroughly cross-examined them and presented its own witnesses in defense (R-3). Thus, a full hearing was held with due notice to petitioner and opportunity to be heard and defend given him in an orderly proceeding adapted to the nature of the case pursuant to applicable Utah statutes.

As the Supreme Court of Utah noted herein at 369 P2d 823, 285, "The evidence showed that Wycoff had persistently violated both the 500 and 100 pound limitations." The Commission, by its Order of September 26, 1960, found Petitioner had violated restrictions on its authority on not less than 37 seperate occasions prior to the hearing; it indicated that such violations would warrant the cancellation of petitioner's authority, but that considerations of public interest made it seem unwise to take such an extreme measure and that the public interest would best be served by imposing the minimum penalty of $500 for each of the violations as authorized by Section 54-7-25 (1), U.C.A. 1953. The order concluded:

"* * * a penalty of $18,500 be, and it is, hereby affixed and assessed against Wycoff Company, Incorporated * * *; said amount to be paid within sixty (60) days from the date hereof, and in case of default, the Attorney General be, and he hereby is, respectfully requested to proceed in the courts to make collection of said penalty at the earliest convenient date." (R-334, 340)

A Petition for Rehearing was denied by the Commission (R-357) and petitioner appealed to the Utah Supreme Court (R-361-4). That court affirmed (unnumbered in record, 369 P.2d 283) and denied Petition for Rehearing on March 30, 1962 (unnumbered in record). Respondents have never been formally notified of the date of filing and of the docket number of case, as required by Rule 21 (2), Rules of Supreme Court of United States. Respondents, by order of this Court dated July 13, 1962, have been granted an extension of time in which to file this Brief to August 15, 1962.

ARGUMENT

I. PETITIONER HAS NOT CONFORMED TO THE RULES OF THE COURT IN SUBMITTING ITS PETITION FOR WRIT OF CERTIORARI AND IT SHOULD BE DENIED.

A. *The Petition does not contain a single page reference to the record as required by the Court's Rule* 40 (2).

B. *Petitioner has not notified Respondents of the date of filing and the docket number of the case as required by the Court's Rule* 21 (2).

C. *The Petition does not present with clearness*

what is essential to a ready and adequate understanding of the points requiring consideration.

The Petition is organized in a confused manner and contains almost exclusively general statements; it is with utmost difficulty that one culls therefrom the exact matters complained of. In "Questions Presented", page 3, the Petition sets up Points A and B, which both deal with the question of whether an administrative body may act in the three functions of investigaton, advocacy and adjudication, the only difference between the two questions presented apparently being whether an administrative body can so act at all or whether it can so act under statutory authority. The Petition in no manner argues the questions separately but treats them as one question and so this Brief will consider both points as one.

Although the Petition in nowise denominates the issue as such, petitioner apparently also complains that the Commission should have applied directly to a state trial court to determine the violations and assess the penalty by virtue of Section 54-7-29, Utah Code Annotated, 1953, providing in general that actions to recover penalties shall be brought in the name of the State of Utah. Respondents urge that the Court should not consider the point because of Petitioner's failure to clearly raise it in the Petition, (*General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 177-178, 82 L.Ed. 1273, 1275, 58 S. Ct. 849 (1938), *Lawn v. U.S.*, 335 U.S. 339, 354, 2 L.Ed. 2d 321, 333, 78 S. Ct. 311 (1958)).

Likewise in Paragraph 13(a), page 11, of the Petition, petitioner apparently complains that the notices of hearing issued by the Commission to petitioner failed to state that

a fine or penalty might be imposed against petitioner. On authority of the *General Talking Pictures Corporation* and *Lawn* cases, supra, respondents urge that the Court not consider the issue.

The Petition in no manner designates the Commission's denial of petitioner's Demand for Bill of Particulars as an issue, but does set the denial out in the Brief in Support of Petition, page 9, and, without citing any authority whatsoever, argues the same. For the same reasons, this question should not be considered by the Court.

At page 11, paragraph 13 (e), the Petition says:

> "Wycoff asserts that this Court has jurisdiction to hear and determine the matters * * * on the following grounds: * * * (e) The statutes under which the Commission operates are unconstitutional as violative of the provisions of the Federal Constitution and the Constitution of the State of Utah."

That statement is incomprehensible as regards clearly defining a specific Federal question.

The Petition does not conform to the Rules of this Court and should be dismissed.

II. FEDERAL DUE PROCESS OF LAW WAS NOT DENIED WHEN THE UTAH PUBLIC SERVICE COMMISSION INVESTIGATED PETITIONER, PRESENTED EVIDENCE AND ASSESSED A PENALTY.

Petitioner claims that it is a denial of Federal due process of law when an administrative body acts as "investigator, prosecutor and judge" (page 3, Petition). Absolutely

no authority whatever is given for that statement. Respondents cannot agree with these words of characterization. The fact is that pursuant to statutory authority, the Commission made an invesigation of facts, presented evidence based on such investigation in open hearing, determined that petitioner had wilfully and knowingly violated the Commission orders and certificate restrictions and imposed a penalty for such violations of its orders.

Many administrative bodies, both State and Federal, must of necessity act in this manner. It has been uniformly held that such administrative procedure does not in itself violate due process. Thus, in *People v. Western Airlines*, 268 P.2d 723, 729 (Cal. 1954), appeal dismissed 348 U.S. 859, 99 L.Ed. 677, 75 S. Ct. 87:

> "It is also observed that the (California Public Utilities Commission) is in the position of acting at times as informer, prosecutor, judge and jury in matters coming before it. * * * This kind of establishment was seriously criticized in its early stages by those affected by it, but it is the law that when the system has been duly authorized by the Constitution of the State and the procedure is such as to satisfy the requirements of due process, both State and Federal, no valid objection can be made to it."

The Federal Administrative Procedure Act of June 11, 1946, 60 Stat. 237, ch. 325, 5 U.S.C.A., Section 1001 et seq., requires that the same personnel participating in investigative or prosecuting functions not be involved in adjudicative functions. The Court reviewed that Act in *Wong Yang Sung v. McGrath*, 339 U.S. 33, 46, 94 L.Ed. 616, 626, 70 S.Ct. 445 (1950) and said:

> "The Administrative Procedure Act did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions."

In *Brinkley v. Hassig*, 83 F.2d 351, 356 (C.C.A. 10th, 1936) the opinion states:

> "It has never been held that such procedure (administrative tribunal acting as both prosecutor and judge) denies constitutional right. On the contrary, many agencies have functioned for years, with approval of the courts, which combine these roles. The Federal Trade Commission investigates, * * * files a charge in its own name as plaintiff, and then decides whether the proof sustains the charges it has preferred. The Interstate Commerce Commission and State Public Utilities Commission may prefer complaints to be tried before themselves."

To the same effect, see 1 Am. Jur. 2d, Administrative Law, Section 78, page 873, and cases cited there.

Here, petitioner does not claim that the three Commissioners of the Utah Public Service Commission who decided the matter also acted as investigators or prosecutors; it does claim the Commission, including all of its personnel, cannot act in all three of these functions. Petitioner's constitutional rights were not violated in this regard, and hence the only specifically denominated Federal question in the Petition must fail on the merits.

III. NEITHER THE LAWS OF THE STATE OF UTAH NOR THE FEDERAL CONSTITUTION REQUIRE PROCEEDINGS TO IMPOSE A PENALTY AGAINST A UTAH INTRASTATE MOTOR CARRIER

FOR VIOLATION OF THE UTAH PUBLIC SERVICE COMMISSION'S ORDERS BE FILED IN THE STATE TRIAL COURT, AND THE COMMISSION ITSELF MAY IMPOSE SUCH PENALTY WITHOUT DENYING THE CARRIER FEDERAL DUE PROCESS OF LAW.

Petitioner contends that, by construction of Section 54-7-29, U.C.A. 1953, and by virtue of the Federal Constitution, the proceedings herein should have been brought in the state trial court, and that the Utah Supreme Court erred in construing the Utah Statutes to the contrary.

A. *The decision of the Utah Supreme Court is correct.*

Article XII, Section 15 of the Utah Constitution provides:

> "The legislature shall pass laws establishing reasonable maximum rates of charges, for the transportation of passengers and freight, for correcting abuses, and preventing discrimination and extortion in rates of freight and passenger tariffs by different railroads, and other common carriers in the state, *and shall enforce such laws by adequate penalties.*" (emphasis added)

Section 54-6-4, Utah Code Annotated, 1953, provides in part:

> "* * * the Commission shall have power and authority, by general order or otherwise, to prescribe rules and regulations in conformity with this act applicable to any and all such common carriers, *and to do all things necessary to carry out and enforce the provisions of this act.*" (emphasis ours)

Petitioner cites Section 54-7-25 (1), U.C.A. 1953, which provides the penalty for violation of Commission orders,

and then relies on Section 54-7-29 which says "action to *recover* penalties under this title shall be brought in the name of the state of Utah." The Utah Supreme Court held herein that:

> "the fact that our statute provides the Commission with an auxiliary remedy, by going to court if that becomes necessary, does not mean that the Constitution cannot impose the penalty prescribed by the Act". (369 P.2d 283, 285)

The same question was presented in *York Telephone & Telegraph Company v. Public Utilities Commission,* 121 A.2d 605 (Pa. 1956) under an almost identical statute. The court said at page 613:

> "When, therefore, the issue of compliance was raised in this proceeding, it was for the Commission alone to determine whether its orders had been violated and to impose the penalty. * * * Under (the statute) the Common Pleas of Dauphin County, is given jurisdiction to the exclusion of all other courts but only to *recover* (emphasis court's) the penalties after they have been imposed by the Commission."

The Commission followed the procedure of the *York Telephone* case when it said in its Report and Order dated September 26, 1960:

> "* * * that a penalty of $18,500 be, and it is hereby affixed and assessed against Wycoff Company, Incorporated * * *; said amount to be paid within 60 days from the date hereof and in case of default, *the Attorney General be, and he is, hereby respectfully requested to proceed in the courts to make a collection of said penalty at the earliest convenient date.*" (R-340).

In *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 98 L.Ed. 933, 74 S.Ct. 745 (1954) the Court held that under the Defense Production Act of 1950, administrative enforcement was also available as cumulative process and was not precluded by the fact that judicial enforcement was also available.

Thus, the Utah Supreme Court has interpreted the Utah statutes and said that, given statutory authority, it is an inherent part of the Utah Public Service Commission's administrative function to assess penalties for violation of its orders, that such statutory authority exists here, and that if a carrier fails to pay such penalties, actions may be commenced in the state court to "recover" (i.e. "collect") such penalty. That interpretation is reinforced by the clear wording of Section 54-7-20, U.C.A. 1953, which provides in subparagraph (1) for the Commission to order a carrier to make repartion to one found, after investigation, to have been charged an excessive rate, and in subparagraph (2) that if the carrier does not comply with the order, "suit may be instituted in any court of competent jurisdiction to *recover* the same". (emphasis added) The Utah court's decision herein interpreting the Utah Statutes is correct.

B. *The Petition raises no important Federal question.*

1. *The law is clear.* Petitioner raises no Federal question on the issue of the Commission's authority to assess the penalty because the law is clear that administrative agencies may assess penalties if they have statutory authority. See *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339, 53 L.Ed. 1013, 1022, 29 S.Ct. 671 (1909):

> "In accord with this settled judicial construction, the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power."

See also *Lloyd Sabaudo Societa Anonima v. Elting*, 287 U.S. 329, 335, 77 L.Ed. 341, 346, 53 S.Ct. 167 (1932):

> "Congress may impose obligations, sanction enforcement by reasonable money penalties, and invest in administrative officials the power to impose and enforce them. * * * Due process of law does not require that courts, rather than the administrative officers be charged, in any case, with determining the facts upon which the imposition of such a fine depends."

2. *No showing of how due process denied.* Even if it were clear that the Commission did not have statutory authority to determine the violations and assess the penalty, petitioner does not claim, except for questions raised as to notice of penalty and as to denial of Bill of Particulars as discussed below, how it was denied due process within the meaning of the Federal Constitution in the hearing it did receive before the Commission. Therefore, if the notice of penalty and denial of Bill of Particulars claims fail, then so must, for lack of a Federal question, the claim that the Commission lacked authority.

In any event, the record is clear that the hearing met

the requirements of Federal due process. The Complaints were answered through counsel (R-303, 304, 306); 8 months later, after three postponments (R-319, 333, 332), a hearing was held so petitioner had ample opportunity to prepare its defense; both sides called and cross-examined witnesses (R-3); the Commission considered and denied a Petition for Rehearing (R-347-8, 357); the Utah Supreme Court affirmed on appeal (369 P.2d 283), then denied a petition for Rehearing (unnumbered in record). The hearing before the Commission meet all elements of due process.

Concerning the appeal, the Utah Supreme Court usually limits its scope of review to review of the law and, as to the facts, a determination of whether there was before the Commission competent evidence (*Ashworth Transfer Co. v. Public Service Commission,* 268 P.2d 990, 994, Utah 1954) to reasonably find as it did (*Los Angeles & Salt Lake R. Co. v. Public Service Commission,* 240 P.2d 493, Utah 1952) and that it did not act in a capricious, arbitrary and wholly unreasonable manner in view of the record before it (*Lake Shore Motor Coach Lines, Inc. v. Welling,* 339 P.2d 1011, Utah 1959). Here, the Utah Supreme Court went much further and stated in its opinion, page 285:

> "Due to the nature and purpose of this statute, it is reasonable and practical to require that the evidence of violation be *clear* and *convincing* before the imposition of such a penalty would be justified. However, it cannot be questioned that the evidence here meets that requirement." (emphasis ours)

At page 15 and 16, the Petition cites 16A C.J.S. 862, as follows:

> "The fact that an administrative agency is both the accuser and judge, does not deprive the accused of due process of law, especially where an appeal on the determination of the agency may be had to the courts."

The Petition then states:

> "This last proviso as to an appeal to the courts is nugatory in this case as interpreted by the Utah Commission, because such is not an appeal on the facts (as the Utah Supreme Court is bound by a determination of the Commission thereon — Section 54-7-19, U.C.A. 1953) — and there can be no true review in consonance with due process."

(Section 54-7-19 is a miscitation. Petitioner apparently refers to 54-7-16: "* * * The findings and conclusions of the Commission on questions of fact shall be final and not subject to review". The statement "not an appeal on the facts" is misleading. As qualified by the *Ashworth, Los Angeles & Salt Lake R. Co.;* and *Lake Shore Motor Coach Lines, Inc.,* cases, supra, the Utah Supreme Court reviews the record to determine whether there was competent evidence for the Commission to reasonably find as it did and to determine that the Commission did not act in a capricious, arbitrary and wholly unreasonable manner in view of this record before it.

3. *Federal Court bound by highest state court's statutory construction.*

Petitioner raises no Federal question at all on the issue of whether the Utah Public Service Commission has statutory authority to assess the penalty because herein Utah's

highest court passed on that question by construing the Utah statutes, and decided at 369 P.2d 285:

> "The fact that our statute provides the Commission with an auxiliary remedy, by going to court if that becomes necessary, does not mean that the Commission cannot impose the penalty prescribed by the Public Utilities Act."

The Federal courts, including the U. S. Supreme Court, are bound by the determination of the highest court of a state as to the construction of its statutes. (*North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 69 L.Ed. 953, 45 S.Ct. 491 (1925) and see voluminous citations at 36 C.J.S., p. 390 to 402).

Because no Federal question is involved, the citation in the Petition of *Public Service Commission of Utah v. Pulos*, 286 P. 949 (Utah, 1930) is meaningless. The Petition argues from that case that the Utah court erroneously construed the statutes on the question of the Commission's power to assess the penalty. This is not an issue here, as the decision of the Utah Supreme Court is final.

IV. ADEQUATE AND PROPER NOTICE OF THE POSSIBLE IMPOSITION OF THE PENALTY WAS GIVEN PETITIONER IN ACCORDANCE WITH THE REQUIREMENTS OF FEDERAL DUE PROCESS OF LAW.

A. *The Utah court properly decided the question.*

Petitioner contends in the Brief in Support of Petition (page 11, paragraph 13 (a), that from the notices of the hearings given by the Commission, it had no notice or know-

ledge that a penalty might be imposed upon it. The Complaint of five respondent carriers specifically asked that the Commission "take such other and further action as may be indicated in the premises" (R-305). The Commission's order of February 11, 1960, ordering the investigation and the Commission's representatives to report to it, said "Upon coming in of said report, the Commission will issue such Order as may be proper in the premises" (R-320). Section 54-4-2, U.C.A. 1953, under which the Commission is authorized to conduct investigations, provides that after hearing, the Commission "shall make such findings and orders as shall be just and reasonable with respect to such matters."

By the plain language of the statutes, every carrier is bound to know that if it violates the Commission's orders and regulations, it is subject to revocation of its operating authority under Section 54-6-20 or under Section 54-7-25 to a penalty. It is indeed unique for petitioner to contend it has been denied due process of law because it did not know the statutes under which it operated. As stated in *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283, 69 L.Ed. 953, 957, 45 S.Ct. 491 (1925):

> "All persons are charged with knowledge of the provisions of statutes and must take notice of the procedure adopted by them, and when that procedure is not unreasonable or arbitrary, there are no constitutional limitations relieving them from conforming to it."

At page 4 the Petition says, "The Commission has never in its entire history attempted to impose a penalty against a motor carrier." Be that as it may, the Commission

has probably never seen a carrier more flagrantly violate its orders. As the Utah Court said herein at 269 P.2d 286:

> "Wycoff's records themselves reflect the numerous violations. Furthermore, Mr. Wycoff's own testimony went more to explanation of reasons why he felt he could not comply with the limitations on authority and thus to justify the violations than to deny that they occurred."

After being warned innumerable times not to violate the 500 pound per shipment limitation, including the Commission's warnings in the two June 1960 notices postponing the hearing (R-330, 332), four of petitioner's trucks were stopped on the highway by the Commission's investigator on the day preceding the hearing and one of those four trucks was carrying 598 pounds of express shipment and one was carrying 709 pounds (R-62, 63). Mr. Wycoff testified: "We are not averaging 500 pounds per truck. There is some trucks that never get anywhere near *and there are other trucks that are consistenly over on it.*" (R-97). It would appear that there could not have been a better place for the Commission to levy its first penalty than in this case.

In *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 1 L.Ed.2d 438, 77 S.Ct. 502, (1957) National Lead Co. complained that the cease and desist order issued by the Commission denied due process because of lack of notice as to the method of enforcement used in the order and because a similar method of enforcing the order had been use in only one prior case. The Court said the order was nothing more than a method of implementation, selected by the Commission, to enforce its violations of the Act, that

the Commission has wide discretion in determining the type of order necessary to bring to an end the practices complained of and that the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

In this case, it would appear that petitioner is fortunate that its operating authority was not revoked. As the reported case reflects, at 369 P.2d 285, the Commission observed that the violations would warrant the cancellation of petitioner's authority but that considerations of the public interest made it unwise to take that extreme measure and that the public convenience and necessity would best be served by imposing the penalty.

B. *No Federal question raised.*

No Federal question is raised by Petitioner on the issue of notice since petitioner fails to point out how it was prejudiced in any way by the notices as given.

V. ADEQUATE AND PROPER NOTICE OF THE NATURE OF THE PROCEEDINGS WAS GIVEN PETITIONER IN ACCORDANCE WITH REQUIREMENTS OF FEDERAL DUE PROCESS OF LAW EVEN THOUGH NO BILL OF PARTICULARS WAS GIVEN PETITIONER.

The Petition at page 18 says, "Further, the notice did not delineate the nature of the offense beyond the mere statement that the Commission was about to engage in an 'investigation' of the practices of this carrier." All of the complaints filed, which petitioner answered, expressly said

that petitioner was violating the 500 and 100 pound limitations on its authority and asked the Commission to take action (R-294, 302 305). The Commission's Order of February 11, 1960, ordered investigation "based upon said complaints and upon its own moton" specifically to determine whether (a) petitioner had violated the 100 limitation and (b) whether it had violated the 500 pound limitation (R-319, 320). The notices of postponement of hearing given June 7, 1960 and June 17, 1960, each specifically ordered petitioner not to violate the 500 and 100 pound limitations (R-330, 332). In the same proceeding, petitioner, on May 13, 1960, filed a Petition which stated in part:

> "2. As a result of *the said investigation* and a review of the express shipments being handled under the authority issued * * *, Petitioner has determined that the needs and requirements of the shippers make it difficult, *if not impossible*, to comply with the stated restrictions as to the total weight of 500 pounds of express items per schedule in intrastate commerce. *In consequence, on numerous occasions, it has transported in excess of 500 pounds of express shipment* on its schedules." (Emphasis added) (R-324)

How can petitioner, in good conscience, say:

> "the notice did not delineate the nature of the offense * * *"

Petitioner complains (Petition, page 9) that the Commission violated its rights of Federal due process when it denied petitioner's Motion for Bill of Particulars at the time it ordered investigation, although Petitioner cites no

authority for the contention. Obviously, at that point the Commission could not give petitioner dates, times and places of the violations since it had not had opportunity to fully investigate the matter. The investigating order did, of course, give specific notice of a general nature of the violations, that is, violations of the 500 and 100 pound limitations (R-320). Furthermore, if a Bill of Particulars had been given at that time, the investigation which the Commission clearly had power to conduct would have been sorely limited, defeating the purpose of the investigation statute. Much of the material and evidence of acts in violation of petitioner's authority came from information and records which were in the exclusive possession and control of petitioner, the details of which were known only to petitioner and unknown to anyone else.

Section 54-7-1, U.C.A. 1953, provides that the Commission shall adopt its own rules of practice and procedure, and Section 21.6 of the Rules of the Commission provides that the Code of Civil Procedure of the State of Utah will govern all proceedings except as otherwise provided by the rules of the Commission. The Demand for Bill of Particulars was not only improper but it was directly contrary to the Utah Rules of Civil Procedure and the rules of the Commission. The civil nature of cases of this type was pointed out in *Helvering v. Mitchell*, 303 U.S. 391, 400, 82 L.Ed. 917, 922, 59 S.Ct. 630 (1938); when a 50% penalty for fraud in filing Federal income tax returns was imposed, the Court said:

> "The payment of fixed or variable sums of money are other sanctions which have been recognized as enforceable by civil proceedings since the original

> Revenue Law of 1789 * * *. In spite of their comparative severity, such sanctions have been unheld against the contention that they are essentially criminal and subject to procedural rules governing criminal prosecutions. * * * That Congress provided a distinctly civil procedure for the collection of the additional 50 percentum indicates clearly that it intended a civil, and not a criminal sanction. Civil procedure is incompatable with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus, the determining of the facts upon which liability is based may be made by an administrative agency instead of a jury * * *; furthermore, the defendant has no constitutional right to be confronted with the witnesses against him."

There can be no question that the denial of the Demand for Bill of Particulars was proper. No Federal question is raised, nor has Petitioner attempted to show any prejudice.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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